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CURRENT TOPICS

The Magistrates' Association

LORD GODDARD'S advice to magistrates, particularly directed to the Appeals Committees of Quarter Sessions, to deal more severely with shoplifters will receive the attention it demands. Nevertheless, with respect, the situation is not so simple as might be supposed. It is true that there are many crimes which can be made scarcer simply by raising the price; there are other crimes for the origin of which we have to penetrate more deeply. Shoplifters are mostly women. There are not so many female criminals as male, but there are more female mental patients than male. There may not necessarily be any connection between these two facts. We have no doubt that some women steal from shops because they want to get something for nothing and for them the penalty must be such as to provide a proper deterrent. Others steal because they are mentally or emotionally ill and it is difficult to distinguish between the two. Those who pour scorn on the psychological approach to the criminal say ironically that poor women are common thieves while wealthy women are kleptomaniacs. In fact often the reverse is true. Women are subject to stresses which men do not fully understand. Unhappily there is still too little interchange of view between the doctor and the lawyer and in any case we are still only on the surface of the human mind. In the meantime it would be a pity to assume that severe sentences are the remedy for all crimes.

Going for the Source

WITH characteristic candour LORD MANCROFT, at a luncheon held in connection with the annual meeting of the Magistrates' Association, suggested that one way of reducing the prison population would be to attach a man's wages like the Scots do and thus avoid cluttering up the prisons with short-sentence prisoners who refuse to pay their debts. As Lord Mancroft said, we have all shied away from it. What is good for Scotland is not necessarily good for us, but there appears to us to be a strong argument for finding out how the system works in Scotland, whether it does injustice and whether its effectiveness is substantially reduced by clever and elusive gentlemen who frequently change their jobs.

Capital Punishment

IN announcing the Government's decision to introduce legislation in relation to capital punishment early next session, the Prime Minister did not commit himself to the details of

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the proposed compromise. If it is correct that the Government intend to suggest the limitation of the death penalty to the murder of policemen and prison officers, we think that this compromise will probably receive considerable support from those who have hitherto advocated complete abolition. If, however, they venture further than this they will find themselves in much the same kind of difficulty as their predecessors did eight years ago. There is, of course, no guarantee that the restriction of the death penalty to the murder of policemen and prison officers would commend itself to the House of Lords, and we still think that the wiser course might well be to let matters rest as we suggested last week.

Road Traffic Problems

A NUMBER of eminent people, including a duchess, have expressed themselves in their different ways during the past week or two on parking and other problems connected with modern traffic. The noble lady expressed herself on 15th October by trying to approach her own house in Belgravia by driving her car backwards and forwards between two cars parked immediately in front of her house. This action, which both her counsel and the magistrate described as "a very human reaction," cost her a £5 fine and 5 guineas in costs. A call for self-help to protect the amenities of private living accommodation in this regard is made in an article at p. 780, *post*. The views of Professor GOODHART, Q.C., on the problem raised by s. 14 of the Road Traffic Act, 1956, which comes into operation on 1st November, as to directing pedestrians, are widely held by many who are not members of the Pedestrians' Association, to which he expressed them on 17th October. He said that the picture of "the reckless pedestrian willing to risk his life" was completely false, and the Act was "a puny little affair with nothing more in it than a feeble growl." The LORD CHANCELLOR, in his address to the Magistrates' Association on 19th October, said that the prime purpose of the new Act is to make for greater safety on the roads. He asked magistrates to impose heavier fines and more disqualifications.

Law and Opinion

THOSE to whom Dicey's "Law and Opinion in England in the Nineteenth Century" is something more than a text-book, and they include all who have been obliged to read it as a text-book, will welcome the attempt by Dr. D. M. WALKER, Professor of Jurisprudence in the University of Glasgow, to bring the subject up to date in his essay on "Law and Opinion in Britain since 1900," the first instalment of which appeared in the *Juridical Review* for August, 1956. Public opinion was described by Bryce in his "Modern Democracies" as "confused, incoherent, amorphous, varying from day to day and week to week." The writer quotes this, and also quotes from Young's Manual of Social Psychology a statement that there may be several publics, a public being a "loosely knit association of persons who are interested to the extent of having opinions on some general topic of attention." Those of us who are interested in the effect which representations by the Council of The Law Society may have on pending legislation will find instruction in what Dr. Walker has to say about consultation of expert and representative interests before a measure is finally in shape for debate and enactment: "The possible dangers from legislation resulting from a majority of votes, possibly of the more foolish or partisan, is greatly mitigated if the measure in question has been approved in principle by the interests affected."

A Receiver of Stolen Property

THE witty and learned reading which Sir KENNETH SWAN, Q.C., Master of the Bench of the Honourable Society of the Middle Temple, delivered before the Society on 26th April, 1956, under the title of "A Receiver of Stolen Property" has been published by the Society (price 2s. 6d.). Sir Kenneth stated that he had for the last thirty-five years deliberately supplemented his "meagre earnings" at the Bar "by employing a large body of skilled and reliable agents to prey upon and plunder my unsuspecting neighbours." In other words, he was a beekeeper, following an occupation which "has the justification of ancient precedent." After a glance at ancient precedent, and the modern precedent of Lord Phillimore, who not only kept bees but tried a case of nuisance in which the defendant kept ten hives of bees in his garden, Sir Kenneth examined the modern authorities on the law of *scienter* and animals *feræ naturæ* as applied to bees. We heartily recommend the publication to our readers.

More Factory Inspectors

IT is good to know that the numbers of factory inspectors are to be increased. There are still far too many avoidable accidents at work but unhappily a large part of the work of the inspector in the past has been devoted to what has happened instead of what might happen in the future. A judge remarked several months ago in the course of a case he was hearing on assize that whereas in traffic accidents the court usually had the advantage of seeing a police report made immediately afterwards, in factory accidents often no details were noted or measurements taken for a long time after. As announced in the *Law Society's Gazette* for September, 1956, at p. 439, the Minister of Labour and National Service has agreed that in certain circumstances factory inspectors may supply solicitors concerned in accident claims with factual statements; the value of these statements must obviously depend to some extent on the staff available.

Commonwealth Law Studies

A GRANT has been made by the Rockefeller Foundation to enable a sub-committee of the Hebdomadal Council of Oxford University to investigate the possibility of making Oxford a more efficient centre for the pursuit of Commonwealth law studies. The grant, which amounts to $10,000, will pay for the travelling expenses and secretarial assistance of the members of the committee, who will travel round this country and the U.S.A., visiting selected law libraries. The members of the committee are Professor C. H. M. WALDOCK, Chichele Professor of Public International Law, Mr. J. B. BUTTERWORTH, Bursar of New College, and Mr. PETER SCOTT, an architect. In moving the decree in Congregation accepting the grant with gratitude, the SENIOR PROCTOR said that at present Oxford's law library facilities were not only inadequate, but had a crippling effect on legal studies in the university. We wish the committee success in its investigations.

COMMON EMPLOYMENT PAR EXCELLENCE

THE old doctrine of common employment was rightly criticised for having been based on a false assumption, namely, that workmen, impliedly, if not expressly, agree to accept the risks of injury through any negligence of fellow-employees. But sometimes there are circumstances where such an assumption bears a close relationship to the truth, and such a case is *Williams* v. *Port of Liverpool Stevedoring Co., Ltd., and Another* [1956] 1 W.L.R. 551 ; *ante*, p. 381. But, in spite of that, since the doctrine was wholly abolished by the Law Reform (Personal Injuries) Act, 1948, the employer cannot escape responsibility for the negligence of fellow-employees on that basis. Can he on any other basis ? He can plead *volenti non fit injuria*, but we know that the courts do not readily apply that doctrine to a servant injured in the course of his employment (though, of course, it can be applied) ; and he can plead contributory negligence. It is of interest to see how these operate as an alternative to the complete immunity which " common employment " would have given.

In *Williams's* case a gang of six men were unloading bags from a barge. The bags stood two feet high and there were many layers of them. The recognised safe method of unloading them was to remove a few layers—five to seven layers—to form a sort of " sink " and then to level off, whereupon another " sink " would be made. Instead of doing this the men agreed amongst themselves to adopt a method of removing bags from a larger number of layers—up to twelve layers—to form " steps." This was more dangerous because there would be some bags some twenty-four feet higher than the lowest layer and the result would be that the cargo would be more unstable and liable to fall. The men adopted this wrong method when the foreman left them. When he came back later and saw them using the wrong method he instructed them to adopt the correct method and warned them that they might get into trouble if they did not follow the correct method. He also spoke to the plaintiff and told him to " level off," which he said he would do. Nevertheless, the gang continued to use their own, wrong method. Eventually a pile of bags collapsed and injured the plaintiff.

At first the plaintiff pleaded bad stowage of the bags against both his employers, a firm of stevedores, and the owners of the ship, but later he amended his pleadings against the stevedoring company to cover unsafe method of stowage and failure of the company's servants (other than the plaintiff) to observe the foreman's order. In their amended defence the stevedoring company denied that any duty was owed by members of the gang to each other, and also alleged voluntary assumption of the risk.

One remarkable feature of this case is that the plaintiff eventually relied on the defendants' evidence and adopted the defendants' arguments. Lynskey, J., held that there was no evidence of bad stowage and the plaintiff sought leave to amend his pleadings and pleaded that the *defendants*, their servants or agents (other than the plaintiff), had *unstowed* vertically downwards instead of by sinking and levelling off ; and also that the defendants' servants (other than the plaintiff) failed to heed the foreman's warning. This is a difficulty which an employer is in to-day : if he pleads that the plaintiff, whilst working with others, continued to work although the others were negligent the employer does not thereby provide himself with a complete defence because he is liable for the negligence of the other workmen if they are also his servants. The most this sort of plea does is to show contributory negligence, subject to the other plea of *volenti non fit injuria*.

As to the latter point, his lordship felt himself bound by the House of Lords case *Stapley* v. *Gypsum Mines, Ltd.* [1953] A.C. 663, where the facts were somewhat similar and where the House held that the employer was responsible for the negligence of the man who was acting in concert with the plaintiff's deceased husband. It was contended in the instant case that the duty which one servant owed to another was not argued in that case but his lordship did not feel that he could allow that contention but was bound by the decision. *Volenti* therefore did not absolve the employer. In a sense such an argument is an argument following the doctrine of common employment and so could be attacked by quoting the Law Reform (Personal Injuries) Act, 1948.

A " fifty-fifty " case

As to contributory negligence, as is well known, it is possible to award an indemnity by holding the plaintiff to be 100 per cent. to blame. But this cannot apply where the plaintiff is one of a group of employees who are all doing wrong, because the employees other than the plaintiff are wrongdoers and the defendant as their employer is vicariously responsible for their wrongdoing. The Law Reform (Contributory Negligence) Act requires the court to have regard to the claimant's share of responsibility. If it is not a 100 per cent. share he cannot be held wholly to blame.

Counsel for the plaintiff argued that if you have a gang of six working together and they all tacitly agree to ignore instructions, or to indulge in a system that is dangerous, then they are all equally to blame, and the plaintiff is entitled to recover five-sixths of his claim because he is only one-sixth to blame. His lordship rejected this argument just as he had the argument that the plaintiff should recover nothing.

His lordship held that the employers were *not* responsible for the *individual acts of each individual person*, but were responsible for a dangerous method of work, tacitly adopted by the six men. The employers were liable for the acts of the men as a gang. His lordship pointed out that the plaintiff alone could have prevented the dangerous method being followed by himself refusing to follow it, and so he decided that it was a" fifty-fifty " case and he halved the amount that the plaintiff would have recovered if he had not been to blame.

A contradiction ?

Here was a case where had it not been for the Law Reform (Personal Injuries) Act, common employment could have been applied with some justice. It would not have been unreasonable to hold that the men voluntarily agreed to run the risks which the wrong method exposed them to, for they did it in defiance of the foreman's order, and it has been held that an employer is not required to stand over his men all the time and see that they adopt safe methods (*Crookall* v. *Vickers-Armstrong* [1955] 1 W.L.R. 659; 99 SOL. J. 401). But, since that Act, an employer remains liable if any of the men working with the plaintiff is negligent and his negligence contributes to the plaintiff's loss.

In laying down such a rule the law seems to contain a contradiction, for it results in an employer being responsible unless he stands over his men all the time to see that they adopt and follow the safe and proper method. For it will be recalled that Lynskey, J., expressly bases his decision on the following of the wrong method rather than on the individual negligence of the individual fellow-workers.

L. W. M.

RUNNING DOWN CASES: CONDUCT BEFORE ACTION—VI

THIS article comprises notes on fatal accident cases and on the Limitation Acts, the Motor Insurers' Bureau Agreement, the question of the Crown and public and statutory authorities, and hospital charges under the Road Traffic Acts, 1930 and 1934.

Fatal accidents

It is now proposed to consider certain special topics relating to fatal accidents. This does not pretend to be an exhaustive survey of the law relating to the payment of damages in fatal cases, but will serve as a reminder to practitioners of the points which have to be borne in mind when instructed on behalf of the victim of a fatal accident. It will, of course, be remembered that the old common-law rule was that a personal action died with the person to whom it pertained.

The first inroad upon the maxim *actio personalis moritur cum persona* was made by the Fatal Accidents Act, 1846, as amended in 1864 and 1908, and this was not a true exception to the rule but an action given to the persons specified in the Fatal Accidents Act, who are lineal ancestors and descendants of the victim. The measure of damages in these accidents is basically the loss suffered by the person or persons who bring the action, resulting from the loss of the breadwinner of the family, and represents the financial advantage which they may have anticipated.

It is, of course, the Fatal Accidents Act claim on behalf of the dependants of the victim which is the substantial claim in fatal accident cases, but even here the limit appears to be in the region of £5,000 or £6,000, save in very exceptional circumstances.

The true exception to the old common-law rule was made by the Law Reform (Miscellaneous Provisions) Act, 1934, which provided that on the death of any person after the commencement of that Act, all causes of action subsisting against, or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

It has been held that even in the case of instantaneous death the injury must precede the death and that therefore the cause of action has arisen before the victim dies, and accordingly the cause of action survives for the benefit of his estate.

As has been mentioned earlier in these articles, the Law Reform Act damages for loss of expectation of life have of recent years never exceeded £500 since the case of *Benham* v. *Gambling* [1941] A.C. 157. It would be fair to say that this figure of £500 is the very top limit of the bracket, which has varied from as low as £100, or indeed in one reported case £75, up to a figure of £300 or £350, and in exceptional cases £500. It has rightly been said that assessing a claim for damages under the Law Reform Act of 1934 is "attempting to equate incommensurables," as it is impossible to estimate accurately what value should be put upon the average person's expectation of life. The courts do take into account circumstances such as a happily married family man, or a young person living in a slum area with a father who had been deserted by his wife and was forced to take the child with him when he went out to work, and in considering these circumstances the courts may increase or diminish the award proportionately. It should not, of course, be forgotten that in addition to Law Reform Act damages for loss of expectation of life, an element in respect of funeral expenses will be included, but no allowance has to be made or increase given for any loss or gain to the deceased's estate consequent upon his death.

The Limitation Acts

The practical points to be remembered apart from the estimate of the value of a Law Reform Act claim are that proceedings brought for the benefit of the deceased's estate are subject to the normal limitation period of three years. Unless the client has been involved in an accident where the negligent party has been killed, the question of the survival of a claim against a deceased person's estate is not likely to trouble us. In the case, however, where a road victim has died as the result of the injuries which he has received and owing to his negligence another is killed or injured, it is provided by the Law Reform (Miscellaneous Provisions) Act, 1934, and by the Law Reform (Limitation of Actions, etc.) Act, 1954, that proceedings must be taken in respect of the cause of action not later than six months after the personal representative of the negligent party takes out representation. It therefore behoves the solicitor acting on behalf of the "innocent" party to make a note in his diary that the proceedings must be issued within six months after probate has been granted or letters of administration obtained to the estate of the negligent party, irrespective of the state of negotiations with the defendant's representative, and it is suggested that this note shall be made upon a date six months after the accident. Until the passing of the Law Reform (Limitation of Actions, etc.) Act, 1954, which was effective as from the 4th June, 1954, the Fatal Accidents Act claim had to be made within twelve calendar months after the death of the victim. This period has now been extended to one of three years and this, as will be seen later in this article, puts the time limit for bringing the Fatal Accidents Act claim on the same footing as the limitation period in normal cases.

The Limitation Acts, 1939 and 1954, have the cumulative effect of making the limitation period in running-down cases one of three years from the date on which the cause of action accrued, and the transitional provisions of the Act of 1954 ensure that in cases where the limitation period applicable to a cause of action accruing before the 4th June, 1954, had not expired on the appointed day, the plaintiff has the choice either of the limitation period existing prior to the 4th June, 1954, which may be six years against a private individual, or the period of three years where that is more advantageous, for instance, where the cause of action came within the terms of the Public Authorities Protection Act of 1893 as amended by the Limitation Act of 1939, which fixed a limitation period of twelve months only for actions against a public authority.

Under the Limitation Act persons under a disability are, of course, subject to special exemptions.

The Crown

Prior to the Crown Proceedings Act, 1947, the Crown was immune in general from legal process, and the feudal principle of the impossibility of the Crown doing wrong was a defence to any government department or official and, indeed, to the Minister responsible himself, to a claim for damage or injury caused by a government vehicle. The actual driver, of course, remained liable, but as a matter of grace the

Treasury Solicitor defended proceedings against him, and the Treasury met any judgment against the Crown servant. The Crown Proceedings Act of 1947 reversed both the rule that the Crown could not be sued in its own courts and the rule that it could do no wrong, and in effect the Crown is now placed in the same position as the private individual so far as a running-down accident is concerned.

The Motor Insurers' Bureau Agreement

Mention should here be made of the agreement made on the 17th June, 1946, between the Minister of Transport and the Motor Insurers' Bureau which refers to the compensation of victims of uninsured drivers and is known as the Motor Insurers' Bureau Agreement. The liability of the Bureau dates from the 1st July, 1946. The purpose of the Agreement is to protect those persons who are victims of the negligent act of a driver who is not covered by third party insurance as required under the terms of the Road Traffic Acts, and the Agreement provides that the Bureau will pay the unrecovered amount of damages awarded by a court in respect of death or personal injury arising out of the use of a motor vehicle on a road in circumstances where liability is required to be covered by insurance under the Road Traffic Acts. Where the damages or part thereof remain unpaid seven days after the judgment becomes enforceable, the Bureau will pay the unrecovered amount, together with taxed costs, to the person in whose favour the judgment has been given against an assignment of the judgment debt. Nothing in the Agreement affects the general position at law of the parties to an action for damages arising out of the accident, and the Bureau's liability under the Agreement can only arise where the plaintiff has successfully established his claim against the tortfeasor in the usual manner, and judgment has been given in his favour. This does not, of course, preclude the acceptance of compensation by the plaintiff under a settlement negotiated between the plaintiff and the alleged tortfeasor or the Bureau itself.

It should be noted particularly that it is a condition precedent of the Bureau's liability that it should receive notification before or within twenty-one days after the commencement of proceedings against the alleged tortfeasor, and in practice it is preferable to notify the Bureau in all cases where the name of the insurers is not speedily forthcoming, in order that the Bureau itself may make certain inquiries and if necessary negotiate a settlement of the claim.

Hospital charges under the Road Traffic Acts

Under s. 36 of the Road Traffic Act, 1930, as amended by s. 33 of the Road and Rail Traffic Act, 1933, where any payment is made by an authorised insurer or the owner of a vehicle in respect of the death of or bodily injury to any person arising out of the use of a motor vehicle on a road, and the deceased or injured person has, to the knowledge of the insurer or vehicle owner, received treatment at a hospital in respect of the injury, the insurer or owner shall pay to the hospital the expenses reasonably incurred by the hospital in affording treatment, after deducting expenses actually received by the hospital in payment of a specific charge for the treatment, not being moneys received under any contributory scheme.

The amount to be paid by the insurer or owner is not to exceed £50 for in-patient treatment, or £5 for out-patient treatment.

The nationalisation of the hospitals has not affected the charge under s. 36 of the Road Traffic Act, 1930, but it must be pointed out that payment for such treatment is only imposed upon the insurer where the insurer or owner makes some payment, either with an admission of liability or by way of compromise, and it is not a liability imposed upon the insurers of the party causing the injury or that party himself, irrespective of fault.

It is still the custom of some hospitals to send an account to the patient or his solicitor and ask that it be included in the victim's claim. It is incorrect to include the hospital account in the statement of claim as it is not part of the special damages recoverable by the victim, but as a matter of practice it is more convenient for the insurance company, if any payment is made at all, to discharge the hospital's account through the plaintiff's solicitor rather than to indulge in additional correspondence and negotiations with the regional hospital board.

It should be remembered that s. 16 of the Road Traffic Act, 1934, also provides that where medical attention is immediately required as a result of bodily injury arising out of the use of a motor vehicle on a road (referred to in the section as "emergency treatment") and the treatment is effected by a registered medical practitioner, the person who was using the vehicle at the time of the accident shall, upon a claim being made in accordance with the terms of the Act, pay to the practitioner certain specified fees, and a medical practitioner in the National Health Service is allowed to demand and accept such fees, as is also a hospital within the National Health Service. It will be noted that the charges for "emergency treatment" are payable by the user of the vehicle, irrespective of fault, admission of liability or payment by way of compromise.

J. G. F.

Mr. JOHN ROLAND ADAMS, Q.C., and Mr. LIONEL JELLINEK have been appointed chairman and deputy chairman, respectively, of the Court of Quarter Sessions for the County of Essex.

Mr. KENNETH LIVINGSTON MACASSEY has been appointed deputy chairman of the Court of Quarter Sessions for the County of Somerset.

Mr. HAROLD BECK WILLIAMS, Q.C., has been appointed deputy chairman of the Court of Quarter Sessions for the County of Middlesex.

Mr. REGINALD A. R. GRAY, senior assistant solicitor to Solihull Town Council, has been appointed deputy clerk to the Malvern Urban Council. Mr. Gray will take up his new appointment next month.

Mr. THOMAS CROWE SPENSER-WILKINSON, Puisne Judge, Federation of Malaya, has been appointed Chief Justice of the High Court of Nyasaland.

THE SOLICITORS ACTS, 1932 TO 1941

WILLIAM BASIL SCOTT, of the District Magistrates' Court, Kumasi, solicitor, having, in accordance with the provisions of the Solicitors Acts, 1932 to 1941, made application to the Disciplinary Committee constituted under the Act that his name might be removed from the Roll of Solicitors at his own instance on the ground that he desires in due course to be called to the Bar, an order was, on 4th October, 1956, made by the committee that the application of the said William Basil Scott be acceded to and that his name be removed accordingly from the Roll of Solicitors of the Supreme Court.

The telephone number of the Incorporated Society of Auctioneers and Landed Property Agents has been changed from WEStern 0034/5/6 to KNIghtsbridge 0034/5/6.

Taxation

ESTATE DUTY—DEBTS AND INCUMBRANCES

In computing the net value of an estate for the purposes of estate duty, one proceeds by aggregating all the various assets that pass or are deemed to pass and then deducting from their total the amount of any debts or incumbrances with which the estate is burdened. The application of this general principle is, however, not so simple as might be thought, and in determining precisely what debts are or are not so deductible, it is necessary first to consider the enforceability of those debts; secondly, to consider separately debts and incumbrances which were and which were not created by the deceased; and, thirdly, to consider the treatment of debts which are due to persons resident abroad.

Enforceability

Apart from the special treatment of debts which have become barred by the Limitation Act, 1939, which is discussed below, no debt is deductible in computing the net estate unless it is legally enforceable. Thus, if, as in *Re Innes* [1910] 1 Ch. 188, a child of the deceased had performed services for him on the faith of an understanding that she was to receive something on account of those services nothing would be deductible in respect of her claim unless it could be shown that there was a proper legally enforceable contract to pay remuneration for services rendered.

A debt which is barred by the Limitation Act, 1939, cannot be said to be enforceable, but it was long ago decided in *Norton* v. *Frecker* (1737), 1 Atk. 524, that personal representatives do not commit a *devastavit* by paying a debt which is barred by that Act or by its predecessors: it was held in *Re Rownson* (1885), 29 Ch. D. 358, that this is an anomaly peculiar to the Statutes of Limitation and not to be extended to the Statute of Frauds. It appears that for present purposes the Commissioners of Inland Revenue are prepared to follow the analogy of these cases and to allow a deduction in respect of a statute-barred debt if that debt is in fact paid out of the estate.

A particular difficulty arises in the case of husband and wife. In the ordinary way, a married woman who contracts for the supply of necessaries such as clothing or household requirements or medical attention does so as agent for her husband, so that if such necessaries should remain unpaid for at the time of her death, it will not be possible to take a deduction from her estate in respect of them because the liability will fall upon the husband. This does not extend to contracts for the supply or purchase of items other than necessaries, although what is or is not a necessity depends upon the station in life of the persons concerned, and it does not apply where it can be shown that, although the items supplied were *prima facie* necessaries, yet the wife was otherwise adequately supplied or was supplied with a sufficient allowance to purchase her own. Another matter of difficulty in the case of husband and wife arises in the matter of income tax and sur-tax upon the wife's separate income. The general rule is that where husband and wife are living together the liability for that tax falls exclusively on the husband, so that nothing can be deducted from the wife's estate, but by the Income Tax Act, 1952, s. 360, the husband or his representatives may, not later than two months from the date of the grant of representation to his wife's estate, require the Commissioners of Inland Revenue to collect the income tax or sur-tax from his wife's estate and not from himself, and if this is done the tax is payable out of the wife's estate and is deductible in computing its net value. It will be appreciated that if it is the husband who has died first the principles apply in a converse direction, so that the debts may be deducted from his estate if they are in fact paid out of that estate and not paid by the wife.

Debts not created by the deceased

The provisions of the Finance Act, 1894, s. 7 (1) (*a*), which are discussed at length below, apply only in the case of debts incurred by the deceased, so that it is necessary to make a distinction between those debts and any debts which may be owing by the deceased which were not created by him. Clearly, such items as incumbrances created by a predecessor in title remaining outstanding will be within this category, and in addition items such as rates and taxes, the liability being created not by the deceased but by the Legislature, would be in the same category, and it seems, although it is not entirely clear, that the same might apply to damages in tort, etc.

In the case of debts not created by the deceased, there is no particular restriction upon their deduction save only that no deduction shall be allowed where there is a right of reimbursement available to the executors, except in so far as such right should prove ineffective in that such reimbursement is not to be obtained in fact. Such debts, and indeed all debts, are to be deducted primarily from the property which is primarily liable for them: thus if a debt is charged upon realty it must be deducted from realty if that realty is sufficient to satisfy it, and is not deductible from the personalty except to the extent that the realty is insufficient and the creditor could recover the excess from out of the personalty under a personal covenant to repay. No deduction at all will be allowed from property which is not at law available to meet the debt, even though in fact the owner of that property volunteers to discharge the debt thereout: a striking example of this is to be found in *Re Barnes* [1938] 2 K.B. 684. In this case, the deceased had made large gifts during the three years preceding his death. He then died hopelessly insolvent, but nevertheless the subject-matter of the gifts was not available to his creditors: the donees of the gifts voluntarily discharged the debts out of the subject-matter of the gifts, and it was held that, whilst the debts could be allowed against what small free estate there was, thus reducing it to nil, there was no provision for any allowance of the debts against the gifts *inter vivos* which were not saddled with them.

Debts created by the deceased

In the case of a debt created by the deceased, not only do the considerations mentioned above apply, but in addition it is provided by the Finance Act, 1894, s. 7 (1) (*a*), that no allowance at all shall be given unless the debt or incumbrance was incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit.

The first thing to observe as to this provision is that it excludes the deduction of any liabilities voluntarily incurred by the deceased: that is to say, it excludes the deduction of the sums due or to fall due under voluntary covenants or under promises to make gifts. Furthermore, it is established

by such cases as *A.-G. v. Smith-Marriott* [1899] 2 Q.B. 595 and *A.-G.* v. *Cobham* (1904), 90 L.T. 816, that equally no deduction is allowed in respect of an obligation undertaken in consideration of the release of a former obligation which was incurred gratuitously.

Whether or not full consideration has been given is a matter to be considered on the facts, and it is to be observed that the test is precisely the same as that in the Finance Act, 1894, s. 3, in connection with the exemption of property passing by purchase. It is to be seen from the judgment of Hamilton, J. (as he then was), in *A.-G.* v. *Boden* [1912] 1 K.B. 539 that the question is not to be determined by a nice weighing of valuations, but rather by looking at the transaction broadly and seeing whether in truth and in fact it was a business transaction wherein perhaps one party had the better of the bargain, or whether there was an element of bounty from one party to another. By the terms of s. 7 (1) (*a*) no relief is available in the case of a debt incurred for partial consideration, but it is understood that where it can be shown that this was the case a proportionate amount of the debt will usually be allowed as a deduction. Whilst marriage is good consideration, it does not constitute valuable consideration, and accordingly a covenant to settle property in a marriage settlement, which covenant remains unfulfilled at the date of death, is not deductible, even though it might be counterbalanced by similar covenants by other parties to the marriage. In the case of a separation of spouses, obligations incurred by a husband in favour of his wife or infant children are allowable if they are legally enforceable, and similarly obligations incurred in connection with a divorce are allowable on the same conditions: in the case of a divorce, an agreement not to apply to the court for maintenance is invalid and unenforceable and will not create any liability, so that it is always advisable that the liability, if it is to continue after the husband's death, should be pursuant either to an order of the court or to a private agreement which has been sanctioned by the court.

It is expressly provided by subs. (1A) of the Finance Act, 1940, s. 44, as amended by the Finance Act, 1950, s. 46, that the creation by a relative of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person is not to be treated as consideration for the purposes, *inter alia*, of s. 7 (1) (*a*), so that, if the deceased were to promise to pay a relative a sum of money in consideration of his covenanting to pay the deceased an annuity, no deduction could be taken for the liability to pay the sum of money if it remained unpaid, and if it were paid it would be treated as a gift *inter vivos*.

The Finance Act, 1939, s. 31, enacts special provisions applicable to the case where a debt is incurred by the deceased for full consideration received by him, but the consideration so received consisted either of property originally derived from the deceased or of a payment of money or transfer of property by a person who was at any time entitled to, or amongst whose resources there was at any time included, any property derived from the deceased. Where the consideration is not itself property derived from the deceased, but is consideration paid by a person amongst whose resources property derived from the deceased was once to be found, relief is given, first, by excluding from the property derived from the deceased any property so derived which is proved to have been acquired from the deceased independently of any object of facilitating the creation of the debt or incumbrance, and, secondly, by allowing the deduction of a proportionate part of the debt when the property remaining, after eliminating such as is mentioned above, is insufficient to provide the consideration received by the deceased. The operation of these provisions can be illustrated by one or two simple examples. If the deceased gives Blackacre to *X* and subsequently purchases Blackacre from *X* for, say, £5,000, which remains unpaid at the date of his death, then no part of that £5,000 is deductible, because the consideration given therefor (i.e., Blackacre) was derived from the deceased. If the deceased, ten years before his death, gave to *X* the sum of £10,000 and one year before his death purchased Blackacre from *X* for £5,000, which sum remained unpaid at the date of death, then that £5,000 could not be deducted until it was shown, as in such case would not be difficult, that the £10,000 given to *X* ten years before was acquired otherwise than with the object of facilitating the purchase and sale of Blackacre. If one year before his death the deceased had given to *X* a house Whiteacre valued at £2,500 and six months before his death had purchased Blackacre from *X* for £5,000, which sum remained unpaid at the date of his death, and if it could not be shown that the gift of Whiteacre was not with a view to facilitating the sale by *X* of Blackacre, then of £5,000 which was owing at the date of the death only £2,500 could be deducted.

Not only must full consideration in money or money's worth be received by the deceased, but, in addition, that consideration must be received for his own use and benefit. In practice, this provision is not very difficult to satisfy, because it is sufficient that the deceased had the power of disposition over the consideration at the time it was received, and it does not matter that he in fact disposed of it immediately afterwards. Thus, if the deceased contracted to purchase a house and, having so contracted, forthwith directed that it be conveyed to a donee *X* as a gift, the purchase price, if it remained outstanding at the date of death, would be an allowable deduction, because immediately after the debt was incurred the deceased had the opportunity of retaining the house for his own use if he had wished to do so. In many cases, when five years have not elapsed, the house itself will be chargeable as a gift *inter vivos*, so that the allowable deduction, looking at the matter in an overall way, will offset the value of the house so chargeable: if, however, the price of the house remains outstanding for more than five years, then there might be an overall saving of duty. Such a case must be contrasted with that in which *X* has contracted to buy himself a house and thereafter the deceased has voluntarily undertaken the liability to pay for it and dies before he has done so: in such a case, there was never any consideration passing to him for his own benefit or otherwise, and accordingly the debt will not be deductible.

In the case of liabilities which the deceased has voluntarily assumed as guarantor of another, there is, by concession or quasi-concession, an apparent exception to the need for consideration. In some cases, it might be possible to show consideration for the deceased having entered into such a guarantee, but in many cases it would not, and without this concessionary treatment any deduction on account of liabilities in the latter type of case would be excluded. In practice, where the deceased was liable as a guarantor, no deduction at all is to be taken unless the liability actually crystallises and the deceased's executors are called upon to implement the guarantee, but if this does happen, then, whether or not the deceased can be shown to have received consideration, a deduction may be taken for the amount actually paid less any amount which may be recovered by the personal representatives from the principal debtor.

There is one class of case where a deduction is not allowed even although the deceased did receive full consideration for the debt. By the Finance (1909-10) Act, 1910, s. 57, it is provided that, if the deceased incurred a debt in or for the purpose of purchasing, acquiring or extinguishing an interest in expectancy in any property passing or deemed to pass on the death, and if the person whose interest in expectancy has been thus purchased, acquired or extinguished becomes in any way entitled to any interest in the property over which his interest in expectancy existed, no deduction is to be allowed on account of the debt if it has remained unpaid. Thus, if the deceased, being entitled to Blackacre for life with remainder to *X*, purchases *X's* reversion, no deduction will be allowed for the purchase price remaining outstanding if by the deceased's will or under his intestacy Blackacre should pass once again to *X*. This provision is unique in that it results in the liability to estate duty payable varying by reference to the destination of the property and to the will or intestacy of the deceased, and it does not seem to be founded upon any considerations of principle at all: indeed, its genesis is merely that the Commissioners of Inland Revenue did not like the decision of the House of Lords in *A.-G.* v. *Richmond and Gordon* (*Duke*) [1909] A.C. 466.

Foreign debts

Special provision is made in the Finance Act, 1894, s. 7 (2), in the case of debts due from the deceased to persons resident out of the United Kingdom which debts are not contracted to be paid in the United Kingdom and are not charged on property situate within the United Kingdom. In general, the effect of this provision is that nothing may be deducted in respect of such debts in the first instance, that is to say, in the original Inland Revenue affidavit, nor can anything be deducted at any stage until it is shown that the property of the deceased in the foreign country in which the creditor resides is insufficient to meet the debts. When this is established, the excess falling upon the United Kingdom estate, to the extent that the debts would in any case be deductible under the provisions discussed above, may be deducted from the United Kingdom estate by corrective affidavit. In practice, where there is no foreign property at all available to meet the debts they may be deducted in the first instance.

G. B. G.

A "CLEAR" ANNUITY?

It may be useful, perhaps by way of reminder rather than instruction (as Dr. Johnson once put it), to draw attention to a matter of construction which Danckwerts, J., decided in *Re Smith; Smith* v. *Gregory* on 12th October. A number of questions about the effect of provisions in a will were raised by the originating summons, and there were suggestions in argument that the draftsman might have adopted without adapting the precedents as set out in a precedent book. As practitioners are well aware, there are words which seem clear at the time they are used but which later are found (especially after they have been scrutinised under the legal microscope) to be ambiguous or to bear a legal meaning which is different from what the word conveys to the layman or even to the lawyer in a moment of inadvertence. The word "clear" when used in certain contexts in a will may bear a different meaning from what the testator has in mind. In the case to which reference has been made the testator and his brother lived in close amity. Not long before his death the testator covenanted to pay his brother £500 a year free of tax, and in his will conferred other benefactions, one of which was a bequest of "the clear yearly annuity of £520." The summons asked (amongst other questions) whether upon the true construction of the will that bequest ought to be paid by the trustees without any deduction in respect of income tax. On the brother's behalf it was urged that if the money covenanted to be paid was to be paid free of tax, "clear" would and should mean "free of tax." The case of *Re Cowlishaw; Cowlishaw* v. *Cowlishaw* [1939] Ch. 654 (in which Bennett, J., held that "free of all duties" and "to be paid free of all deductions whatsoever" conferred a tax-free benefit and which, though it was not followed by Uthwatt, J. (as he then was), in *Re Hooper; Phillips* v. *Steel* [1944] 1 Ch. 171, has not been overruled) was also cited. It was further submitted that whereas at one time there were legacy duties, and "clear" could thus be construed as meaning "clear of legacy duty," since the abolition of legacy duty "clear" was meaningless unless it referred to income tax. But in his judgment on this point the learned judge said that on the authorities the word "clear" does not result in a gift free of tax. He could not see anything in the will to contradict that construction. Whatever might have been the more probable intention of the testator, the words used in the will did not confer a tax-free benefit; and he made a declaration in that respect accordingly.

P. H.

Alderman Frank A. Clark, retired solicitor and former Mayor of Reading, was married recently to Miss Muriel Maplesden.

Mr. C. H. Crebbin, solicitor, of Bangor and Caernarvon, was married on 15th October to Miss Nancy Evans, of Menai Bridge.

Mr. Robert Christopher Curl, solicitor, of Sale, was married on 11th October to Miss Nonie Rutland Chadwick, of Sale.

Mr. Tom Dowell, solicitor, of Prestatyn, was married on 11th October to Miss Joyce Thomas, of Meliden.

Mr. Arthur Charles Akeroyd, retired solicitor, of Rylstone, Lightcliffe, formerly of Halifax, left £37,521 (£37,201 net).

Mr. Philip Jessop Blake, retired solicitor, of Sheffield, left £42,404 (£41,734 net).

MR. W. B. DAVIES

Mr. William Bassett Davies, retired solicitor, of Hull, died recently at Pietermaritzburg, Natal, aged 58. He was admitted in 1920.

MR. R. A. LOSEBY

Mr. Reginald Arthur Loseby, retired solicitor, of Leicester, died on 15th October, aged 79. He was admitted in 1899.

MR. H. H. THOMPSON

Mr. Henry Howard Thompson, solicitor, of Cheltenham, died on 12th October, aged 76. He was admitted in 1904.

Mr. C. C. UPTON

Mr. Cecil Charles Upton, solicitor, of Romford, died recently, aged 76. He was admitted in 1901.

Company Law and Practice

COMPANY DIRECTORS: FILLING VACANCIES ON RETIREMENT

SECTION 184 of the Companies Act, 1948, a new provision that had not appeared in the 1929, or previous, Acts, enables a company by ordinary resolution, after special notice, to remove a director before the expiration of his period of office, notwithstanding anything in the articles or any agreement between the company and the director. The provisions of the section as to special notice, and as to the circulation of any representations that may be made by the director, are fairly well known, no doubt partly because on one or two occasions when the section has been invoked there has been some attendant publicity. Possibly because of this publicity in a few exceptional cases, it is sometimes wrongly thought that any change of director requires the machinery of the section to be invoked. This is not the case, the circumstances to which s. 184 applies being confined to cases where it is proposed to remove the director before the expiration of his term of office.

Parenthetically it may be remarked that possibly a little of the misapprehension has arisen from the provisions of s. 160, which requires special notice to be given of a resolution at a company's annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be reappointed. There is no similar provision applicable to directors in like circumstances.

Vacation of office

Removal under s. 184 of the Companies Act, 1948, is only one of several ways in which a director may vacate office. The most common way is retirement under the provisions of the articles: as under art. 89 of Table A, which requires one-third of the directors to retire from office at every annual general meeting after the first. By art. 91, a retiring director shall be eligible for re-election, and, by art. 92, the company at the meeting at which a director retires may fill the vacated office by electing a person thereto, and in default the retiring director shall, if offering himself for re-election, be deemed to have been re-elected, unless, at such meeting, it is expressly resolved not to fill the vacated office or unless a resolution for the re-election of such director shall have been put to the meeting and lost.

Nomination of candidates

Table A, art. 93, provides that no person other than a director retiring at the meeting shall, unless recommended by the directors, be eligible for election to the office of director at any general meeting unless not less than three nor more than twenty-one days before the date appointed for the meeting there shall have been left at the registered office of the company notice in writing, signed by a member duly qualified to attend and vote at the meeting for which such notice is given, of his intention to propose such person for election, and also notice in writing signed by that person of his willingness to be elected.

From the foregoing it is seen that, in the case of a company the articles of which follow Table A, if it is desired to propose for election as a director some person other than a retiring director and such person is not a nominee of the directors, all that is necessary is for the appropriate notice and consent to be deposited at the company's office the requisite time before the meeting. The person concerned can then be proposed for election as a director at the meeting. No question of special notice, or representations by the retiring director whose re-election is to be contested, arises.

Of course, the provisions of the articles of the company concerned must be complied with. Thus, in *Cheshire* v. *Gordon Hotels, Ltd.* [1953] C.L.Y. 504, under the company's articles it was necessary to lodge with the secretary a notice of intention to propose the election of a director, and a signed statement of the proposed director's willingness to stand for election, not less than fourteen days and not more than a month before the date of the meeting. Notice was lodged the day before the meeting. The articles had not been complied with and a declaration was made that the three members concerned had not been validly elected as directors of the company.

Ordinary or special business

Whether the election of directors is ordinary or special business will depend on the articles, and, in the case of a company the articles of which are similar to Table A, on the number of vacancies on the board for which there are candidates compared with the number of directors retiring.

In the first place, art. 52 of Table A makes all business special that is transacted at an extraordinary general meeting and also all that is transacted at an annual general meeting with the exception of, *inter alia*, the election of directors in the place of those retiring.

The position is well illustrated by *Choppington Collieries, Ltd.* v. *Johnson* [1944] 1 All E.R. 762. The company's articles prescribed a maximum of five directors. There were in fact three. One director retired in rotation and a motion for his re-election was lost. There was a resolution moved to elect three different persons as directors and as there was only one vacancy caused by retirement the proposal to elect three persons as directors was, therefore, special business. The notice of meeting had contained the sentence "To elect directors." The Court of Appeal, adopting the judgment of Uthwatt, J., in its entirety, held that the notice of meeting was sufficient.

The articles of the company had required, in the case of special business, that the notice of meeting should specify the general nature of that business, as does art. 50 of Table A in the Companies Act, 1948. Uthwatt, J., had said, at p. 763, "There is no need to specify that the business is special. There is no need to specify the exact nature of the business. It is not necessary to say 'I propose *A* or *X* as a director.' All you have to do to comply with the articles is to specify the general nature of the business. I think there is in this notice a sufficient specification of the general nature of the business to bring it within the competence of the meeting to elect directors up to the number permitted by the articles."

Conclusion

The term of office of a director must depend on the articles of the particular company. Even if he has a service agreement he can still be removed before his term of office expires, but without prejudice to his rights under his agreement. When

his term of office expires s. 184 has no application in connection with his re-election.

The position where the articles are silent as to the term of office of a director arose recently in South Africa : see *Appel* v. *Sher*, noted at [1950] C.L.Y. 541, where it was held that the company had power to appoint a director and, when it pleased, remove him. The principle would seem equally applicable in this country and, as the director holds office at the pleasure of the company, he must be considered to be aware that his term of office can be made to expire at any time and, thus, s. 184 would not appear to apply.

H. N. B.

A Conveyancer's Diary

STREET PARKING

THE newspapers contained reports last week of the Duchess of Sutherland being fined £5 and ordered to pay five guineas costs for damaging two motor cars parked near her house in the centre of London. It was alleged that she drove her car forward so that it hit one of the parked vehicles and that she then reversed into the second. The fine applied to a summons alleging malicious damage, to which the Duchess pleaded guilty ; it appeared that she had torn a draught excluder away on one of the vehicles and pulled a windscreen wiper off the other. The owners had been compensated for these items of damage before the hearing of the summons. For the defence it was said that the bumping into the other motor cars had been done in trying to make a space in front of her own house in order to park her own motor car there. The magistrate, according to some reports of this case, expressed sympathy with the defendant in this difficulty.

A few days later in a letter to *The Times* a woman Member of Parliament referred to this case and suggested that there must be thousands of householders in London (and, of course, the problem is not confined to London) who are in a constant state of irritation at the complete indifference of those people who park their cars all day and every day in front of somebody else's front door. She then went on to describe her own experiences. She lived in a small street in central London, and it was impossible to get a car to her own front door in the morning, afternoon or evening. Coming home late in the rain, no taxi could put her down at the kerb ; she had to get wet going round other people's cars. On Saturdays, when one might perhaps have hoped for a little peace, the hall near by held dances, and so after midnight there were the dancers going home in their cars. " The total lack of any consideration for people who may be in bed is . . . the most irritating feature ; one would never believe that most cars had only four doors . . . Perhaps the law says that private householders have to suffer this nuisance . . . "

Well, it depends on what is meant by " nuisance," and what the householder is prepared to do to help himself in defence of what I believe to be his own rights.

Trespass

I start off with the proposition that it is a tort for a person to leave his motor car in the highway adjoining another person's house without that person's consent. To do so constitutes either a trespass or a nuisance. I have in the past expressed the view that it was a trespass. This view is based on the presumption of the law that in the absence of evidence to the contrary the soil of a highway to the middle of the road (*usque ad medium filum viae*) belongs to the owner of the land adjoining the highway (see, e.g., *Stephens* v. *Whistler* (1809), 11 East 51), and on the principle that a dedication of a public road to the public is simply a dedication of the surface of it for the purpose of passing and repassing (see *per* Lord Cairns, L.C., in *Rangeley* v. *Midland Rail Co.* (1867), L.R. 3 Ch. 310). If this is so, then the only thing which the presumed owner of the half of a highway adjoining his house is bound to permit thereover is the passage of traffic ; in regard to the placing of stationary objects thereon the public have no greater rights than they would have in or on a private garden at the back of the house.

It is said, however, that the vesting of the highway and its materials in the local highway authority effected (in urban areas) by s. 29 of the Local Government Act, 1929, has had the effect of depriving the owner of the soil of the ownership of the air space superincumbent on the highway, and that for this reason trespass will no longer lie at the suit of the owner : *Tithe Redemption Commission* v. *Runcorn U.D.C.* [1954] Ch. 383 is suggested as the authority for this view. I rather doubt it. In his judgment in that case the present Master of the Rolls cited with approval a passage from the judgment of Farwell, J., in *Hertfordshire County Council* v. *Lea Sand, Ltd.* (1933), 98 J.P. 109, where in dealing with the nature of the vesting under s. 29, the learned judge said : " The right of the original owner of the land remains untouched, and he remains the owner in fee simple of the land, but subject to there being vested in the road authority the actual road itself and so much of the soil as is necessary to enable the road authority to perform its statutory duties of repairing and maintaining the road as a highway." This suggests that the effect of the statute is a qualified one, to enable the authority to enter and carry out works, as at common law the inhabitants at large were entitled to enter and carry out works in discharge of a common-law duty. There is nothing in the decision itself in the *Tithe Redemption Commission* case directly on this point.

Nuisance

But if this view is wrong, and s. 29 has deprived the owner of the soil from bringing an action for trespass in the circumstances with which this article is concerned, there is no doubt that it is open to the owner to lay his case in nuisance. The rule is established by many authorities. Every person who occupies land adjoining a highway has a private right of access thereto from his land and vice versa, and any act done without lawful excuse whereby the exercise of this right is obstructed is a private nuisance.

Practical steps

Now, as a practical matter, how best to take advantage of the position (for, in my opinion, it is the position) that the person who parks his motor car at the kerb outside your house is a tortfeasor? First, it is, I think, essential, whatever line

of action is eventually pursued, to make it clear to the would-be parker that to leave his vehicle outside the house is an action to which you do not consent and that it will, or may, be treated as a tort. This can be done by a notice in simple but cogent language, fixed either to the house or to the fence or railings of the house abutting on the highway, or erected a movable pole which may be placed at the edge of the pavement. The latter would probably be the more effective. It may, of course, constitute some kind of offence, e.g., under the Town Police Clauses Acts (an indictment for obstructing the highway is a possibility which may, I think, be disregarded in this connection). It is, therefore, advisable to inform the police beforehand of any proposal to place a notice actually on the highway in this manner. This, I suggest, may most conveniently be done by lodging a complaint with the police about the obstruction of your right of access to your house by parked vehicles and then, when nothing is done about it, by a second complaint accompanied by a warning that a notice will be placed on the highway outside the house if the parking continues (as, of course, it will).

Self-help

When the preparations have been made it will be possible to deal with an actual offender in one of two ways—by action, or by self-help. The first will usually be difficult. An injunction is the effective remedy, but obtainable only if the offender, in defiance of warnings, threatens to continue or repeat his offence. It would, therefore, be necessary to warn the motor car owner, and to act with great speed. Difficulties would often arise in obtaining the name and address of the offender so that he might be served with process. Self-help seems the better course.

Assuming the tort, it would clearly be within the householder's rights to remove the vehicle from his land (if it is his land) or from land where it obstructs the access to his house (if it is not his land), and if the vehicle is immovable and locked, I can hardly think that it could amount to malicious damage to break open a window, doing no more damage than is necessary, so that the brakes may be released and the vehicle moved. To avoid complaints from neighbours it would doubtless be advisable to arrange beforehand that a neighbour should keep a part of the highway adjoining his premises clear of parked vehicles, so that the offending vehicle may be moved there; a mutual arrangement on these lines may be possible.

I am not a criminal lawyer, and I can give no guarantees that the course which I have suggested will not land the householder in the dock, but I think that it would not. Is there, then, anybody who is willing to run some risk to strike a blow at what is, in common speech, an intolerable nuisance? For a few cases of broken windows and the publicity which they would attract would at least draw the interest of a temporising minister and an aloof police to the problem, and do more than half a dozen governmental committees to ameliorate it. I cannot do it myself. Whenever I have asked a motorist not to park his vehicle outside my front door in the relatively quiet part of London in which I live, he has immediately complied with my request; there is plenty of parking space in the vicinity.

"A B C"

Landlord and Tenant Notebook

BUSINESS PREMISES: RESTRICTIONS IN TERMS OF NEW TENANCY

WHILE we have a fair number of decisions on the question whether a tenant is entitled to a new tenancy under Pt. II of the Landlord and Tenant Act, 1954, little has been heard of the question what the terms of such a tenancy should provide. Duration and rent are, of course, the features which mostly interest the parties; ss. 33 and 34 provide for these; but in *Gold* v. *Brighton Corporation* [1956] 1 W.L.R. 1291 (C.A.); *ante*, p. 749, the dispute concerned the extent to which the terms of a new tenancy should restrict the nature of the business to be carried on: "other terms," which are dealt with by s. 35.

The landlords in that case had bought the premises in 1931, in connection with a road-widening scheme, but had let them in 1940 on a yearly tenancy to one *Z*, a dealer in second-hand clothes. The agreement prohibited user, without the landlord's consent, otherwise than as shops, offices, photographer's studio or dental surgery. In February, 1954, *Z* assigned the term to the appellant in the case and she carried on "a high-class business as a dealer in new and second-hand furs and new and second-hand ladies' wear, the main part of that business being in second-hand clothing." In May, 1955, the landlords gave her notice to quit (? to terminate) expiring at Christmas; she served them with a notice requiring a fourteen-years' tenancy and otherwise on similar terms so far as applicable to those contained in the existing agreement.

The landlords objected to the "similar terms" part of the proposal and submitted a draft with the following covenants: "Not to use or suffer to be used the demised premises otherwise than as a furriers and for the sale of ladies' wear without the consent of the corporation," and "Except with the prior consent of the corporation . . . not to use or suffer to be used the demised premises for the sale or purchase of second-hand goods."

On the reference to the county court, the landlords' valuer gave evidence that "he would expect a prudent landlord to restrict the user of the premises so as not to lower the tone of the district." The judge took a middle course, holding that it was reasonable that some restriction should be put on user and ordering that, while children's wear should be added to ladies' wear, user for the sale and purchase of second-hand goods, with the exception of furs, should be prohibited save with the consent of the corporation.

The tone of the district

It may be important to note that, when allowing the appeal, the Court of Appeal did so for the reason that there was no or insufficient evidence to support the finding. The contention, said Denning, L.J., was only hinted at; rather vaguely, said Birkett, L.J., it was suggested that dealing in second-hand clothing would lower the business tone of the

district; such evidence as there was, said Parker, L.J., was of the flimsiest nature. (The landlords had, moreover, since proceedings began, granted a new lease of the premises next door to the tenant's daughter, and one permitting her to sell second-hand clothes on those premises. Inconsistency of this kind may not be fatal, but it calls for explanation.)

What, I suggest, is important is that the court did not negative the proposition that an established desire to maintain tone would justify a restriction. Whether what a "prudent landlord" would do is a relevant consideration, or the proper way of approaching the question, was not gone into. In my submission, the county court judge and the Court of Appeal may well have shared the bewilderment of Lord President Clyde, who in a Scottish agricultural rent case discussed in the "Notebook" for 8th September last (*ante*, p. 664) said: "I am by no means clear as to what is meant by a prudent landlord or a prudent tenant . . ."

Object of Landlord and Tenant Act, 1954, Pt. II

But all three lords justices freely referred to what was to be considered the object of the legislation. It was "to preserve the business which the tenant has lawfully carried on on the premises": Parker, L.J.; "to provide security for the tenant": Birkett, L.J.; "to protect the tenant in respect of his business": Denning, L.J., who referred to the opening section of Pt. II, s. 23, applying the Part to premises which are occupied by the tenant "for the purposes of a business carried on by him."

But it will have been observed that the tenant did not succeed in getting things entirely her own way: restrictions which had not been a feature of the 1940 tenancy were sanctioned. The reason is most explicitly stated by Denning, L.J.: "It is to be remembered that the object of this Act is to protect the tenant in respect of his or her business, and not to put a new saleable asset into her hands."

We are, I think, likely to hear more of this statement; and argument will ensue on the point whether "new" means "not existing before"; "now made, or brought into existence for the first time"; or just "fresh, further, additional." For the statement does remind one of Romer, L.J.'s "It has frequently been pointed out by the courts . . . that the principal object of the Rent Restrictions Acts was to protect a person residing in a dwelling-house from being turned out of his home": *Skinner* v. *Geary* [1931] 2 K.B. 546 (C.A.) (more recently echoed by Greene, M.R., in *Curl* v. *Angelo* [1948] 2 All E.R. 189 (C.A.)). If Denning, L.J., was, consciously or unconsciously, drawing an analogy between security of tenure of dwelling-houses and security of tenure of business premises, it may be that the word "saleable" was intended to emphasise the point, the learned lord justice postulating that a new tenancy granted under Pt. II of the Landlord and Tenant Act, 1954, cannot be assigned. In my submission, this reasoning would overlook the differences between the method of conferring security, that of the Rent Restrictions Acts being by way of depriving courts of jurisdiction and entitling the "statutory" tenant to retain possession conditionally (see p. 731, *ante*).

But if, as it were, one is to read the words of the judgment as "not to put a *new* saleable asset into her hands" rather than as "not to put a new *saleable* asset into her hands," one is left wondering why the Court of Appeal did not accede to her application for a tenancy which would contain the same restrictions as those of the terminated tenancy, so that she could assign it to a tobacconist or an ironmonger if she wished to. Nothing was actually said about the meaning and effect of the direction "shall have regard to the terms of the current tenancy" in s. 35.

Costs

The decision also contains some guidance on the question of costs. The county court judge had ordered the tenant to pay half the landlords' costs. The Court of Appeal held that this was wrong because "both parties negotiated for a new lease and could not come to terms. It had to be referred to the judge on the amount of rent and other terms. He struck a middle course." We are in fact told very little about the dispute as to rent; the amount reserved by the yearly tenancy is not given; the tenant offered £400 a year, the county court judge made it £650, and the tenant did not appeal against that figure. But, no doubt treating the dispute about restrictions as the main issue, the Court of Appeal decided that each party should pay its own costs in the court below, and the appellant tenant should be awarded the costs of the appeal.

Duration of new tenancy

While both parties were agreed that the new tenancy should be for fourteen years (the most a court could order), it is of some interest to note that Parker, L.J., in his judgment expressed the view that this length of term might be a factor to be taken into consideration when deciding upon the reasonableness of the restrictions. The tenant had, the learned lord justice observed, originally held from year to year and, apparently, subject to a special provision entitling the landlords to determine the tenancy by a six-month notice expiring on *any* quarter-day. They had not objected to a fourteen-year grant, and not based their plea for restrictions on the ground that, having given up a right to determine by six months' notice, they ought to have something in return. The suggestion appears to be that they had "missed something" and that it is open to a landlord to make freedom from restrictions a bargaining counter when negotiating length of term.

Specified trades

The lessors in *Gold* v. *Brighton Corporation* were anxious about the tone of the district; they probably considered, and rightly so, that a covenant not to do anything whereby that tone might be lowered would share the fate of the covenant "not to erect any building of an unseemly description" held, in *Murray* v. *Dunn* [1907] A.C. 283, to be too vague to be capable of enforcement; hence the particularising. The county court judge's proposed concession of a right to sell second-hand furs may be said to have recognised the special status of those articles, to which *The Times* "agony column" frequently bears witness. In the event, the provision and exception were not incorporated; but as attempts to achieve the object by particularising and specifying have often given rise to problems of demarcation, I propose to conclude by commenting on a passage in Birkett, L.J.'s judgment which, if it were intended to be authoritative, might some day lead to difficulties.

The passage runs: "It was contended here, for example, that one could sell a second-hand mink coat in this particular street without lowering the tone of the district, but if one sold a ladies' second-hand costume, because some lady found that it did not fit her properly or for some other reason, that, for some obscure reason, lowered the tone of the district." One knows that some of the distinctions which have been

drawn are exceptionally fine, e.g., between the business of a ladies' outfitter and that of a hosier and draper (*Stuart* v. *Diplock* (1889), 43 Ch. D. 343 (C.A.)), that of a fishmonger and that of a fried-fish shop (*Errington* v. *Birt* (1911), 105 L.T. 373), that of a motor garage and that of a motor show-room (*Derby Motor Cab Co.* v. *Crompton and Evans' Union Bank, Ltd.* (1915), 31 T.L.R. 185). In view of which I respectfully suggest that the sale of misfits might not be held to infringe a restrictive covenant specifying "second-hand goods." The same would, I submit, apply to "rejects" or "throw-outs."

R. B.

HERE AND THERE

PROPER SETTING

ONE knows perfectly well that it is convenient for the hearing of the arguments in most of the appeals to the House of Lords to be relegated to the Appellate Committee, since then there can be no interruption when the Chamber is wanted for political business. But it was charming that the Law Lords should have been sitting in the House itself when all the little Miss Worlds from the beauty contest visited it. One had the momentary illusion that at any moment a chorus of peers, robed and coroneted, might enter from behind the throne and that the Lord Chancellor, bursting into song, might declare the ladies wards of court, with one for you and one for ye and one for thou and one for thee. By contrast, one felt the inadequacy of the Committee Room, for all its vast pastoral tapestries and tall windows giving on to the river, as a worthy setting for the argument in the appeal on the claim to British nationality by Prince Ernest Augustus of Schloss Marienburg, Nordstemmen, in Hanover. Nothing less than the full blaze of the boast of heraldry, the pomp of power, could do justice to a case in which regal genealogies going back to the seventeenth century were to be unrolled before the noble and learned Lords and in the issue of which almost every royal family in Europe has an interest, so widely disseminated are the four hundred descendants of that aged Electress of Hanover who, had she lived but two short months longer, would have succeeded Queen Anne upon the English throne. A mere Committee Room is good enough for bills of lading and the Factories Acts, but echoes of the lost cause of the Stuarts and the triumph of the Whigs should have sounded nowhere but in the emblazoned Chamber itself.

DEVALUED CRIME

WHEN one remembers the outcry in certain French newspapers at the harshness of the English law in hanging Ruth Ellis, it comes as a surprise to hear that in the opinion of a judge of the Supreme Court of France, expressed in a lecture delivered to the Law School at Cambridge, the *crime passionel* is in his country going through a process of devaluation and deglamorisation alike with the learned, the legislators and even the general public. Less influenced by romantic literature than his father and his grandfather, the modern Frenchman, suggests the judge, tends to see amorous murder as just another form of criminal killing—an exaggerated remedy for "*un petit malheur privé.*" Since apparently the *criminel passionel* is usually a man, the admission of women to serve on juries has tended to infuse into their conclusions something of the practical female instinct of self-defence. It may also be that the change from a jury of twelve deliberating alone, as with us, to a jury of seven retiring with the presiding judge and his two assistants, has tended to eliminate the wilder acquittals. It may be so, but it has been said with a good deal of truth that every judge is one-third a common juror beneath the ermine, with a concealed tendency to be swayed by the same emotional appeals.

BRITISH RECORD

PERHAPS the settled English conviction that French courts handle the *crime passionel* with a particularly sympathetic indulgence springs from the fact that in France the law of evidence admits a great deal more background material as relevant to the actual *res gestae*, and that often tends to bring into relief those extenuating circumstances which may give ground for a merciful view. Still, in no country in the world is it an actual disadvantage for a lady in the dock to have a pleasing face, figure and personality, and it is remarkable how often these assets have worked almost literally like a charm in British courts:

> "She makes the greatest prince her slave,
> The rich, the learned and the brave.
> When beauty doth her power pursue,
> What can't a charming woman do?"

Madeleine Smith, Christina Gilmour, Adelaide Bartlett, Elvira Barney, one cannot dismiss their good looks out of hand as a contributory factor to the favourable verdicts which removed them from the shadow of the gallows. In the case of the first two ladies, professional opinion was that the judge himself was powerfully affected by their charms. In this respect the amiable weakness of Lord Justice-Clerk Hope, who tried them both, was so well known that the dashing Madeleine was advised by her counsel to make appropriate display of her well turned ankle. Christina Gilmour's assets were equally striking. The story of the timely removal by poison of Madeleine's lover turned blackmailer is well known. Less well known is Christina's history. She was the daughter of prosperous farming people in Ayrshire, good looking, well educated and sought after, but she rejected many suitors, being, as they say, practically engaged to the son of a neighbouring farmer. What went wrong with their relationship nobody knows, but there came another Richmond into the field, a young farmer, of high character and solid substance, who wooed her passionately and finally obtained her promise. Whether she was swept off her feet or coerced by her father to accept, or annoyed with her former intended, is also uncertain. Anyhow, he accepted the *fait accompli* and withdrew his pretensions to her hand. From that moment Christina changed from a bright, cheerful girl and became subject to fits of moodiness and abstraction, but finally, on the 29th November, 1842, she went through with the wedding without any apparent signs of reluctance. On the 11th January following, her bridegroom died after a short and mysterious illness. He was duly buried, but three months later rumours led to his exhumation. He was found to have died of arsenic poisoning. His young widow meanwhile had fled to America, but she was pursued and extradited under the recent Ashburton Treaty, having strenuously contested the proceedings in the American courts and even feigned insanity. She was proved to have purchased arsenic, but the jury found it possible to return a verdict of "Not Proven." The most sympathetic French jury could hardly have done better.

RICHARD ROE.

ABSOLUTELY . . .

FORTUNATELY for the profession, legal technicalities do not often intrude themselves at breakfast. But we do not always escape.

"After all this fuss about Nina, she was found to be innocent after all and acquitted."

"No, dear, she was found guilty, convicted and ordered to pay costs."

"But she was discharged absolutely. It says so here."

"Yes."

"Well, what does 'absolutely' mean? Doesn't it mean that she walked out of court just as innocent as when she walked in?"

"No, dear, it doesn't mean anything of the sort. It means that she was allowed to go although she was in fact found guilty."

"But the dictionary says 'absolutely' means 'unlimited, unrestricted, completely.' And here's a special law term—'absolution,' which means 'an acquittal or sentence of a judge declaring an accused person innocent'."

"You see, my dear, when a magistrate finds a person guilty of a comparatively trivial offence, or when she has never been convicted before, he may deal with her leniently in two different ways—he may discharge her absolutely or he may discharge her conditionally, the condition being that she behaves well within the next twelve months."

"Then what you mean is not that she was discharged 'absolutely' but 'unconditionally'."

"Yes."

"Then why don't you say so?"

"I didn't say so—the man who drafted the Act of Parliament in his wisdom decided to say 'absolutely' when he meant 'unconditionally'."

"But isn't this very important? If we ourselves don't use English properly, how can we expect the Russians to understand Western democracy? They may think the girl was acquitted and we say she was convicted. There may be much worse trouble over this than we've had already. They may say we are trifling with the reputation of a citizen—and with the risk of atom warfare——"

I take refuge, as so many husbands have done in similar circumstances, in the morning train and the sanctuary of the office, pursued by the vision of atomic warfare breaking out because of the unfortunate choice of a word by some person or persons unknown who ought to have known better.

F. T. G.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal".]

Using Mortality Tables

Sir,—I have just seen your issue of 18th August and as an actuary I was somewhat alarmed at the remarks of "Escrow" on p. 615. I sincerely hope he is not busting his trusts on the basis of the Carlisle Mortality Table. This table is at least 170 years out of date and, if ever used by actuaries, is only used as an expedient with an age adjustment. It is acknowledged to be faulty at advanced ages and that it is so is the only conclusion that can safely be drawn from the figures that "Escrow" quotes.

Modern annuitant mortality tables produce much higher annuity values at nearly all ages and do not award bonus marks for the very aged. Use of the Carlisle Table without adjustment will nearly always result in gross injustice to the life tenant, except at these advanced ages, when it may have the opposite effect. I hope, however, that in practice "Escrow" relies on the advice of an actuary when the value of a particular interest is involved. The advisability of doing so is illustrated by his remarks, as they serve to show how one can go astray in using mortality tables without expert knowledge of their construction and application.

London, E.C.3. J. W. BRIERLEY, F.I.A.

"Escrow" writes: "There is no cause for alarm. Your correspondent has mistaken the drift of my comments, which were concerned with stamp duty only. However much out of date the Carlisle Mortality Tables may be, they are still used by the office of the Controller of Stamps (Adjudication Section). Except at those advanced ages mentioned by your correspondent, this system is to the advantage of the taxpayer, because use of more modern tables would usually result in a higher value for the life interest and the stamp duty would be more. As to the wisdom of consulting actuaries on the arithmetic of "trust busting" in general, I endorse your correspondent's views and venture to refer him to my notes to the like effect at 99 SOL. J. 629."

The Notary Public

Sir,—I have read with interest the letters recently published in THE SOLICITORS' JOURNAL from your correspondent "Solicitor and Notary" in Essex, and from the Secretary of the Incorporated Society of Provincial Notaries Public of England and Wales.

The reminder that documents executed in this country for use abroad—and conversely documents executed abroad for use in the United Kingdom—should be attested by a notary is both pertinent and opportune.

It is by no means an infrequent occurrence for members of my Society, in the course of their daily practice, to be presented with documents for use abroad which have been rejected by the authorities overseas because they lack proper authentication. More often than not, those documents will have been witnessed—possibly through ignorance or oversight—by a solicitor or commissioner for oaths instead of being authenticated, in accordance with the recognised international practice, by a notary.

It will be readily appreciated that, apart from any question of delay, added expense, and annoyance to the client, the omission to have the document properly authenticated at the outset could easily have serious consequences. I have in mind those all-too-frequent cases where "time is of the essence," such as a sale of property abroad, the entering of an appearance to defend legal proceedings before a foreign court, or other cases where there are time limits to be observed.

I cannot help feeling that often where a solicitor or commissioner consents to witness a document destined for abroad he does so with the understandable but ill-advised desire "to oblige" his client. The client seldom bothers to acquaint the solicitor or commissioner with the fact that the document has been rejected. The result is that the practitioner is led into the erroneous belief that he is acting correctly and repeats the performance when next he is approached.

The advice given by your previous correspondents, namely, that practitioners should seek the aid and assistance of a notary in the authentication of foreign documents, cannot, therefore, be too strongly stressed in both their clients' interests and their own.

The Society of Public Notaries of London,
WILFRID M. PHILLIPS,
Honorary Secretary & Treasurer.

London, E.C.2.

BOOKS RECEIVED

A Concise History of the Common Law. Fifth Edition. By THEODORE F. T. PLUCKNETT, Fellow of the British Academy, Professor of Legal History in the University of London. pp. xxvi and (with Index) 802. 1956. London : Butterworth and Co. (Publishers), Ltd. £2 7s. 6d. net.

Pitman's Equity Series. An Introduction to Equity. Fourth Edition. By G. W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law, Professor of English Law in the University of London. pp. xl and (with Index) 382. 1956. London : Sir Isaac Pitman & Sons, Ltd. £2 15s. net.

Government Departments as Purchasers. By A. S. WISDOM, Solicitor. 1956. Chichester : Justice of the Peace, Ltd. 4s. net.

The Lawyer's Remembrancer and Pocket Book. By ARTHUR POWELL, K.C. Revised and edited for the year 1957 by J. W. WHITLOCK, M.A., LL.B., assisted by S. H. W. PARTRIDGE, M.A. pp. 350. 1956. London : Butterworth and Co. (Publishers), Ltd. 15s. net.

Clerk and Lindsell on Torts. Eleventh Edition. Second Cumulative Supplement. By F. MAURICE DRAKE, M.A., of Lincoln's Inn, Barrister-at-Law. 1956. London : Sweet and Maxwell, Ltd. 6s. 6d. net.

Chitty on Contracts. Twenty-first Edition. Volume 1 : General Principles ; Volume 2 : Specific Contracts. Second Cumulative Supplements. By F. MAURICE DRAKE, M.A., of Lincoln's Inn, Barrister-at-Law. 1956. London : Sweet and Maxwell, Ltd. 6s. 6d. net (together).

A Guide to Business and Professional Tenancies. By K. R. BAGNALL, LL.B., of Gray's Inn, Barrister-at-Law. pp. xxvi and (with Index) 271. 1956. London : Shaw and Sons, Ltd. £1 15s. net.

The Law Relating to Monopolies, Restrictive Trade Practices and Resale Price Maintenance. Reprinted from Butterworth's Annotated Legislation Service. By The Right Hon. THE VISCOUNT HAILSHAM, P.C., M.A., one of Her Majesty's Counsel, and ROBIN MCEWEN, M.A., of the Inner Temple, Barrister-at-Law. pp. v and (with Index) 117. 1956. London : Butterworth & Co. (Publishers), Ltd. £1 2s. 6d. net.

Laws and Flaws. Lapses of the Legislators. By EDWARD F. IWI. pp. (with Index) 224. 1956. London : Odhams Press, Ltd. £1 1s. net.

The Death Duties. First Supplement to the Twelfth Edition. By ROBERT DYMOND and REGINALD K. JOHNS. pp. xi and 76. 1956. London : The Solicitors' Law Stationery Society, Ltd. 8s. 6d. net.

At the June, 1956, examination for Honours of candidates for admission on the Roll of Solicitors of the Supreme Court, the examination committee recommended the following as being entitled to Honorary Distinction—*First Class* : Sidney Carson, LL.B. London. *Second Class* : (in alphabetical order) John Harrison Adshead, B.A., LL.B. Cantab. ; Russell Ashbourne Basker, LL.B. Nottingham ; Nigel Fox Bassett, B.A. Cantab. ; Victor Woolf Benjamin ; John William Blanchard, B.A. Cantab. ; Roger Paget Booth, LL.B. Leeds ; William Henry Broughton ; Geoffrey Ian Bullough ; Richard Gordon Campbell, LL.B. London ; David William Cunningham ; Roy Bernard Farley, LL.B. Manchester ; David Foster, LL.B. Birmingham ; Peter Owen Gardiner ; John Gwynne Grenfell, B.A. Oxon ; Michael Thomas Harrison, B.A., LL.B. Cantab. ; John Gordon Haslam, LL.B. Birmingham ; Steven Edward Quixano Henriques, B.A. Oxon ; Christopher Raynor Hewetson, B.A. Cantab. ; Basil Heys ; Adrian Derek Glendon Hill ; Matthew Thornton James, B.A. Cantab. ; Richard Trevor Johnson, B.A., LL.B. Cantab. ; Stanley Charles Jones, LL.B. London ; Stanley Warren Laufer, LL.B. London ; David Lister, B.A. Cantab. ; John Boardman Makinson, B.A. Cantab. ; Roy Samuel Manock ; Brian John Martin, LL.B. London ; Philip Joseph Masters ; Robert Marshall Bateman Metcalfe, LL.B. Nottingham ; Robert David Millett, B.A., LL.B. Cantab. ; John Dane Mitson, B.A., LL.B. Cantab. ; Peter Donald Stuart Nicholls ; Neville Lewis Orchard, B.A. Cantab. ; Brian Lloyd Parry, LL.M. Wales ; Norman Ronald Pearless ; Paul Leo Quin, LL.B. Leeds ; Esmond Patrick Thomson Roney, B.A. Oxon ; Eric Leonard Ross ; David Raymond Saffrin, LL.B. London ; Frederick Sandhouse, LL.B. London : Trevor Henry Montague Shaw, LL.B. London ; Mark Hebberton Sheldon, B.A. Oxon ; John Brian Stutter, B.A., LL.B. Cantab. ; Lawrence Wesley Sumner ; John Derek Throp, LL.B. London ; Ian Clapham Waite, B.A. Cantab. ; Michael Thomas Wilford, B.A. Cantab. *Third Class* (in alphabetical order) : John Akroyd, B.A. Oxon ; Michael William Ward Athey, LL.B. Birmingham ; John Barrie Backes, M.A., LL.B. Cantab. ; John Hugh Baldwin ; John Ramsey Balmforth, B.A. Oxon ; John Adrian Bassett, LL.B. Birmingham ; William Gordon Beckett, B.A. Cantab. ; Norman Isadore Beckman, B.A. Oxon ; Roger Alan Bellingham, LL.B. London ; John Allen Brougham, LL.B. London ; John Albert Burrell ; Alan Peet Buttrum ; John Claude Byrnell, B.A. Cantab. ; David Lyn Hale Clifford, B.A. Cantab. ; Martin Clore ; Brian Cookson, LL.B. London ; Alan Gordon Cross, LL.B. Liverpool ; Anthony Peter James Danson, LL.B. Liverpool ; John George Davey ; Cecily Edna Davies, LL.B. Wales ; David Michael Davies ; Tudor Hill Davies, LL.B. Liverpool ; Colin Michael Dennis, B.A. Oxon ; William Nixon Dodds ; John Nigel Dunham, B.A. Cantab. ; David John Eldridge ; Alec Crowther Fergusson ; Kenneth John Gyles, LL.B. Manchester ; Ian Vincent Haigh ; David Martin Hargreaves, LL.B. Nottingham ; Philip Charles Harris ; David Jeremy Horsfall ; Robert Peter Howarth, LL.B. Manchester ; Michael Hughes, LL.B. Wales ; George Desmond Ide ; Michael Francis James ; Brian Jeacock, B.A. Oxon ; Anthony Johnson, LL.B. Liverpool ; Hywel John Wynne Jones, B.A. Wales ; Timothy Ernest Newton Kemp ; Christopher Kirkham, LL.B. Manchester ; Adrian Robin Ledbury ; Graham Lee, LL.B. Nottingham ; Ralph Harrison Meadows, LL.B. Liverpool ; Philip Stanley Morris, LL.B. Nottingham ; John Frank Newth, B.A. Oxon ; John Bernard O'Connell, LL.B. Manchester ; Michael O'Connor ; Roy Mervin Palmer ; David Harold Phillips, B.A., LL.B. Cantab. ; Ralph Paul Ray, B.Sc. London ; Richard Taubman Redmayne ; Boris Rumney, LL.B. London ; Neville Birchwood Sanders, LL.B. Manchester ; Richard Charles Sawtell, B.A., LL.B. Cantab. ; John William Scott, B.A. Oxon ; Mark Reid Sharman B.A. Cantab. ; Werner Arthur Shawdon, B.A., LL.B. Cantab. ; Derek Arthur Taylor, LL.B. Nottingham ; Meyric Leslie Thomas, B.A. Oxon ; Monty Wernick ; Robert Jeffery Whitfield, LL.B. Liverpool ; Hugh Jones Williams, LL.B. London ; Harold Fitzhardinge Wilson Wilson ; Joseph Woolwich, LL.B. Liverpool ; Geoffrey Francis Wyatt, LL.B. London ; Cyril David Zelin, LL.B. London. The Council of The Law Society have accordingly given a class certificate and awarded the following prize : To Mr. Carson—The Clement's Inn Prize, value £40. The Council have given class certificates to the candidates in the Second and Third Classes.

One hundred and ninety-one candidates gave notice for examination.

The City of London College, Moorgate, London, E.C.2, announces a course of five lectures on Restrictive Trade Practices and Monopolies by Mr. Edward A. Morrison, B.A. (Oxon), barrister-at-law, which will be held from 5.30–7.0 p.m. as follows : 6th November : Restraint of Trade in Its Commercial Implications ; 13th November : Commercial Conspiracy and Kindred Wrongs ; 20th November : The Domestic Tribunals of Trade Associations ; 27th November : The Restrictive Trade Practices Act—History—Registration of Trading Agreements ; and 4th December : The Restrictive Trade Practices Act—The Public Interest—The Enforcement of Resale Price Maintenance Agreements.

Fee for the course, or any part thereof, is £2 2s.

NOTES OF CASES

These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.

Court of Appeal

BUILDING REGULATIONS: "TEMPORARY STRUCTURE": CONCRETE SHUTTERING IN COURSE OF DEMOLITION

Grant *v.* George Wimpey & Co., Ltd.

Singleton, Jenkins and Parker, L.JJ.

3rd October, 1956

Appeal from Lynskey, J.

The Building (Safety, Health and Welfare) Regulations, 1948, provide by reg. 93 that any "temporary structure erected for the purpose of operations to which these regulations apply, not being a scaffold . . . shall be of good construction, sound material and adequate strength and stability, having regard to the purpose for which it is used." The defendants were engaged in building concrete houses, and the plaintiff was in their employment as a builder's labourer. To build the houses the defendants adopted a system of "shuttering" by which a temporary structure was erected and liquid cement was poured into it. When the cement had hardened, the structure was demolished, re-erected and used elsewhere. During demolition a wooden corner piece, some 9 inches thick, fell and injured the plaintiff. Lynskey, J., dismissed an action brought for damages for negligence and breach of statutory duty. The plaintiff appealed on the ground of breach of statutory duty only.

SINGLETON, L.J., said that the defendants' contention was that the regulation had no application at the time when the accident happened. It was not disputed that the shuttering was a "temporary structure"; the question was whether the corner piece which fell was a "temporary structure" within reg. 93 at the time when it fell. It was not established that the shuttering and corner pieces as originally erected were not of adequate strength and stability. It was not the right approach to look at one part of a "temporary structure" during the process of demolition, when the remaining parts must necessarily become unstable. When the time came for demolition of the "temporary structure" there was no further use for it, and at that stage reg. 93 ceased to have any application. The appeal should be dismissed.

JENKINS, L.J., agreed.

PARKER, L.J., agreeing, said that the regulation was not concerned with safety during the course of erection or of demolition. Appeal dismissed.

APPEARANCES: *A. D. Karmel*, Q.C., and *J. W. Stansfield* (*Field, Roscoe & Co.*, for *Leigh & Johnson*, Manchester); *D. J. Brabin*, Q.C., and *D. G. F. Franks* (*Gardiner & Co.*, for *A. W. Mawer & Co.*, Manchester).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 1316**

Chancery Division

MORTGAGE: POSSESSION: EQUITABLE CHARGES BY ASSIGNEE OF LEASE IN FAVOUR OF ASSIGNOR AND PLAINTIFF: GRANT OF UNAUTHORISED UNDERLEASE TO DEFENDANT: CONFIRMATORY LEGAL CHARGE ASSIGNED BY ASSIGNOR TO PLAINTIFF: CONTRACT BUT NOT CONVEYANCE SUBJECT TO UNDERLEASE

Rust *v.* Goodale

Harman, J. 27th July, 1956

Action.

C-R, in January, 1951, entered into an agreement for a lease of a dwelling-house for a term of eleven years. In July, 1953, he assigned the benefit thereof to *W-H*, who thereupon charged his interest in favour of *C-R*. In November, 1953, *W-H* executed a further charge in favour of the plaintiff. Notwithstanding the fact that both mortgages contained provisions excluding all statutory powers of leasing, *W-H* granted an underlease of the first floor of the property to the defendant. In February, 1954, pursuant to the agreement of January, 1951, a lease was granted to *W-H* and he was thereafter precluded from denying that the defendant had a legal estate. In April, 1954, *W-H* executed a confirmatory legal charge in favour of *C-R* and in exercise of his statutory power of sale *C-R* entered into a contract to sell the property to the plaintiff. The contract contained conditions that the sale was made subject to and with the benefit of the underlease of which the plaintiff had notice, but *C-R* "gave no warranty as to the validity or otherwise thereof," and was made subject also to the plaintiff's equitable charge. The conveyance contained no reference to the underlease, although notice was given to the defendant that the aforesaid condition was contained in the contract, but it was expressed to be subject to the plaintiff's charge. In June, 1955, the plaintiff claimed possession of the first floor from the defendant.

HARMAN, J., said that the defendant had contended on a number of grounds that the underlease, admittedly void or voidable when first granted, had become binding on the plaintiff. (1) A mortgagee's right to treat as a trespasser a tenant under an unauthorised lease was incident only to the mortgage, and so soon as the mortgagee sold or foreclosed the right was gone. No authority had been produced for that proposition, and *Doe d. Downe* v. *Thompson* (1847), 9 Q.B. 1037, was against it. (2) Even if the first mortgagee could have assigned his right to the plaintiff, he had not done so, as there was no express assignment of it in the conveyance, and the contract to assign was expressly subject to the underlease. As to that, there was no necessity for an express assignment of such a right. A second mortgagee purchasing the first mortgage acquired all the rights of the vendor which a stranger would get. The conveyance superseded the contract, which could not be looked at for any purpose. A parallel was to be found in *Smith* v. *Widlake* (1877), 3 C.P.D. 10. (3) The first mortgagee had lost his right to object to the underlease before the assignment, and the plaintiff taking under him was in no better position. But there had been no acceptance of rent either by the plaintiff or his assignor, who had never waived his right to object to the underlease. (4) As the legal title of the defendant antedated that of the plaintiff's assignor, the defendant had the prior legal right and was ahead. But as between the mortgagee and the tenant under an unauthorised lease, no legal estate was created. The mortgagor must be taken to have been exercising his right to make a lease good only as between himself and the tenant, as pointed out by Farwell, J., in *Iron Trades Employers Association* v. *Union Land and House Investors, Ltd.* [1937] Ch. 313. No question of priority of legal estates arose. (5) The plaintiff's right as second mortgagee disappeared on the conveyance to her of the first mortgage and she was now unable as second mortgagee to object to the underlease. On that point it seemed that the defendant was right; the effect of s. 89 (1) (*a*) of the Law of Property Act, 1925, was to destroy the plaintiff's leasehold reversion as second mortgagee. As, however, she succeeded as successor to the first mortgagee, this point did not avail the defendant. Judgment for the plaintiff.

APPEARANCES: *P. Ingress Bell*, Q.C., and *W. T. Elverston* (*Cooper, Bake, Fettes, Roche & Wade*); *J. G. Strangman*, Q.C., and *H. Hillaby* (*Cecil Jobson*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 749**

Queen's Bench Division

"PEDLAR": MEANING

Sample *v.* Hulme; Walmsley *v.* Hulme

Lord Goddard, C.J., Hilbery and Ashworth, JJ.

4th October, 1956

Case stated by Dewsbury, Yorkshire, Justices.

Two salesmen, employed by a firm in Barnsley, travelled to Dewsbury with two other employees of the same firm in a motor van in which were also carried goods which they intended to offer for sale or use as samples. They had no horse or other beast

bearing or drawing a burden. In Dewsbury the motor van was left in Reform Street and the salesmen left the van and went separately and on foot from house to house in Reform Street carrying goods with them. Each of them effected a sale of some goods to an occupant of a house in Reform Street, the sale in each case taking place at the door of the house. The salesmen appealed against convictions for having unlawfully acted as a pedlar within the meaning of the Pedlars Act, 1871, without having obtained a certificate, contrary to s. 4 of the Act. Section 3 of the Pedlars Act, 1871, provides: "The term 'pedlar' means any hawker, pedlar, petty chapman . . . or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares or merchandise . . ."

LORD GODDARD, C.J., said that as the word "or" in s. 3 was disjunctive, the section should read: "without any horse . . . travels and trades on foot and goes to other men's houses carrying or exposing goods for sale." It was impossible to say that because a man arrived at a fixed point and there left his vehicle and proceeded to walk through the town—it might be for a mile, it might be for six miles—he was not travelling on foot. He was going from house to house and he was travelling from house to house. The court could not regard the word "travelling" as meaning travelling from one town to another. A man travelled on foot as soon as he had left his car or his van or a house. The justices came to the only possible conclusion.

HILBERY and ASHWORTH, JJ., agreed. Appeal dismissed.

APPEARANCES: *Richard Elwes*, Q.C., and *Philip Syrett* (*Paisner & Co.*); *Geoffrey Rippon* (*Sharpe, Pritchard & Co.*, for *A. James*, Dewsbury).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[1 W.L.R. 1319**

SOLICITOR: CONVICTION FOR INDECENT ASSAULT: STRUCK OFF THE ROLL: MATTERS FOR CONSIDERATION IN VARYING PENALTY

***In re* a Solicitor**

Lord Goddard, C.J., Hilbery and Ashworth, JJ.
4th October, 1956

Appeal from the Disciplinary Committee.

A solicitor was convicted on two charges of indecent assault and sentenced to three months' imprisonment from which he did not appeal. The Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, found that he had been guilty of conduct unbefitting a solicitor and made an order striking him off the Roll. He appealed against the order.

LORD GODDARD, C.J., said that any case of indecent assault by one male on another was detestable and serious, but the present case was not nearly as serious as many, as there was no attempt at corruption. The court was always very loth to interfere with the findings of the committee either on facts or with regard to penalties. In a matter of professional misconduct it would take a very strong case to induce the court to interfere with the sentence passed, because the committee were obviously the best people for weighing the seriousness of professional misconduct. But there was no suggestion of professional misconduct in the present case, and the court were bound to consider, as they would have to do in the Court of Criminal Appeal, whether or not the sentence was proportionate to the misconduct proved. No doubt in such cases the committee acted to protect the honour of the profession and to maintain the confidence of the public in solicitors, but the appellant's professional brethren and others acquainted with him had sent in a large number of affidavits testifying to his hitherto excellent character as a solicitor and as a man, and all expressed their anxiety that he should be able to practise among them and their willingness to co-operate with him; it appeared, therefore, that public confidence need not be deeply shaken. The honour of the profession should, of course, be protected, and offences of that sort could not be overlooked by the profession, but the court must consider whether in all the circumstances the sentence passed was in proportion to the character of the offence. Taking everything into account, the order was too severe considering the nature of the offence proved, and should be varied by substituting a sentence of suspension for two years. It had been urged for The Law Society that it would have been open to the solicitor to apply for reinstatement to the Master of the Rolls. That would be a very appropriate remedy if the case had been one of professional misconduct, but this was a case where a crime had been committed, and in such a case the court should not shirk their duty and leave it to the Master of the Rolls, though it could not be suggested that in the present case the appellant could not apply to the Master of the Rolls.

HILBERY and ASHWORTH, JJ., agreed. Penalty varied.

APPEARANCES: *F. Elwyn Jones*, Q.C., and *J. Rutter* (*Cartwright, Cunningham*, for *Martin Evans & Son*, Merthyr Tydfil); *J. R. Cumming-Bruce* (*Hempsons*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 1312**

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Air Navigation (Fourth Amendment) Order, 1956. (S.I. 1956 No. 1578.) 5d.

Diplomatic Immunities Restriction (Amendment) Order, 1956. (S.I. 1956 No. 1579.)

Fowl Pest (Infected Areas Restrictions) Order, 1956. (S.I. 1956 No. 1611.) 8d.

Liverpool – Warrington – Stockport – Sheffield – Lincoln – Skegness Trunk Road (Manton Lodge, near Worksop, Diversion) Order, 1956. (S.I. 1956 No. 1606.) 5d.

Local Education Authorities Recoupment (Further Education) Amending Regulations, 1956. (S.I. 1956 No. 1588.)

Local Government (Qualifications of Assessors) (Scotland) Regulations, 1956. (S.I. 1956 No. 1594 (S.75).) 5d.

London Traffic (Prohibition of Waiting) (Chalfont St. Peter) Regulations, 1956. (S.I. 1956 No. 1609.) 5d.

London Traffic (Unilateral Waiting) (No. 4) Regulations, 1956. (S.I. 1956 No. 1610.) 5d.

Motor Vehicles (Driving Licences) (Amendment) Regulations, 1956. (S.I. 1956 No. 1602.)

Retention of Cables, Mains and Pipes under Highways (Norfolk) (No. 2) Order, 1956. (S.I. 1956 No. 1589.) 5d.

Sierra Leone (Legislative Council) (Interpretation) Order in Council, 1956. (S.I. 1956 No. 1583.)

Stopping up of Highways (Berkshire) (No. 7) Order, 1956. (S.I. 1956 No. 1604.) 5d.

Stopping up of Highways (Dorset) (No. 2) Order, 1956. (S.I. 1956 No. 1590.) 5d.

Stopping up of Highways (Essex) (No. 28) Order, 1956. (S.I. 1956 No. 1599.) 5d.

Stopping up of Highways (Gloucestershire) (No. 18) Order, 1956. (S.I. 1956 No. 1595.) 5d.

Stopping up of Highways (Leeds) (No. 3) Order, 1956. (S.I. 1956 No. 1600.) 5d.

Stopping up of Highways (London) (No. 37) Order, 1956. (S.I. 1956 No. 1596.) 5d.

Stopping up of Highways (London) (No. 38) Order, 1956. (S.I. 1956 No. 1597.) 5d.

Stopping up of Highways (London) (No. 39) Order, 1956. (S.I. 1956 No. 1601.) 5d.

Stopping up of Highways (Nottinghamshire) (No. 10) Order, 1956. (S.I. 1956 No. 1603.) 5d.

Stopping up of Highways (Reading) (No. 1) Order, 1956. (S.I. 1956 No. 1572.) 5d.

Stopping up of Highways (Salop) (No. 4) Order, 1956. (S.I. 1956 No. 1591.) 5d.

Stopping up of Highways (Warwickshire) (No. 12) Order, 1956. (S.I. 1956 No. 1575.) 5d.

Stopping up of Highways (West Suffolk) (No. 1) Order, 1956. (S.I. 1956 No. 1605.) 5d.

Stopping up of Highways (Wiltshire) (No. 7) Order, 1956. (S.I. 1956 No. 1598.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Vendor Holding Auction Sale on Property before Completion—
POSSIBLE DAMAGE TO PREMISES

Q. *A* has entered into a contract to sell a dwelling-house and curtilage to *B*. The contract incorporates The Law Society's General Conditions of Sale, 1953, and does not contain any special condition giving the vendor a right to hold an auction sale on the premises before completion. *B* has just become aware that *A* proposes to hold an auction sale on the premises shortly before completion with a view to selling most of his furniture and effects. *B*, who wishes to be advised as to his position, is anxious to prevent the auction if possible as he is afraid that damage may be caused to the premises thereby and he points out that he has always understood that the vendor could not hold an auction without the purchaser's permission unless the right to do so is expressly reserved in the contract. We, however, cannot find any definite authority on this point. We should be much obliged to have your view as to whether or not *A* can hold a public auction on the premises if *B* objects.

A. We know of no rule to the effect that a vendor requires the purchaser's consent before holding an auction. As *A* is entitled, apparently, to retain possession we do not see why he should not hold the auction. We regret we cannot quote authority for our view; so far as we are aware there is no decision and the matter is merely one of a man using his own property. Pending completion a vendor is obliged to carry out ordinary repairs to prevent deterioration of the property (*Royal British Building Society* v. *Bomash* (1887), 35 Ch. D. 390; see the other authorities quoted in Emmet on Title, 14th ed., vol. I, p. 213). It might be advisable, therefore, to warn the vendor that he is regarded as liable to make good any damage caused as a result of the auction.

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 21 Red Lion Street, London, W.C.1.

They should be **brief, typewritten in duplicate,** and accompanied by the name and address of the sender **on a separate sheet,** together with a **stamped addressed envelope.** Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

NOTES AND NEWS

Miscellaneous

DEVELOPMENT PLAN

DURHAM COUNTY DEVELOPMENT PLAN

(*a*) *Felling Town Map*
(*b*) *Whickham Town Map*
(*c*) *Shildon Town Map*

The Minister of Housing and Local Government amended the above development plan on 28th May, 1956, in relation to Felling town map and on 30th June, 1956, in relation to the Whickham town map and the Shildon town map. A certified copy of the plan as amended by the Minister has been deposited for public inspection at the County Planning Office, 10 Church Street, Durham, and certified extracts of the plan as amended so far as it relates to the undermentioned districts have also been deposited at the places mentioned below—

Felling Town Map—

Felling Urban District Council Offices.
Boldon Urban District Council Offices.

Whickham Town Map—

Whickham Urban District Council Offices.

Shildon Town Map—

Shildon Urban District Council Offices.

The copy and extracts of the plan so deposited will be open for inspection free of charge by all persons interested at the places mentioned above during normal office hours. The amendment became operative as from 16th October, 1956, but if any person aggrieved by it desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the making of the amendment, he may, within six weeks from 16th October, 1956, make application to the High Court.

SOCIETIES

The annual foundation day luncheon of the GLOUCESTERSHIRE AND WILTSHIRE INCORPORATED LAW SOCIETY was held at the Bell Hotel, Gloucester, on 17th October, in commemoration of the foundation of the society on 17th October, 1817. The president of the society, Mr. Walter H. Jessop (Cheltenham), presided, and proposed the loyal toast, and that of "The memory of the founders and the continued success of the society." The president of The Law Society, Sir Edwin Herbert, K.B.E., was the only guest, and he gave a short address. Ninety-two members attended.

PRINCIPAL ARTICLES APPEARING IN VOL. 100

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Lists of articles published earlier this year appear in the Interim Index (to 30th June) and at p. 718, *ante* (7th July to 29th September)

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